BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LARRY B. GRIGGS	)	
Claimant	)	
V.	)	
	)	
CESSNA AIRCRAFT CO.	)	
SPIRIT AEROSYSTEMS, INC.	)	Docket Nos. 240,070
Respondents	)	& 1,072,397
AND	)	
	)	
INSURANCE COMPANY OF	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Self-insured respondent, Cessna Aircraft Co. (Cessna), through P. Kelly Donley, requests review of Administrative Law Judge Thomas Klein's April 22, 2016 Post-Award Medical Award. Jonathan Voegeli appeared for claimant. Spirit Aerosystems, Inc., and its insurance carrier (Spirit), appeared by Eric Kuhn.

The record on appeal is the same as that listed by the judge.

ISSUES

Docket No. 240,070 concerns claimant's request for post-award medical treatment in connection with an October 10, 1997 accidental right knee injury when he worked for Cessna. Docket No. 1,072,397 concerns claimant's asserted November 12, 2014 injury by accident while working for Spirit.

The judge ordered Cessna to provide claimant medical treatment and a list of three physicians from which he could select an authorized doctor. Cessna appeals and argues claimant's need for medical treatment is due to the 2014 event, which it classifies as an intervening accidental injury. Further, Cessna argues the judge applied the wrong standard to determine whether claimant's 2014 injury was the direct and natural consequence of his 1997 injury. It argues claimant's 1997 injury had fully healed by the time of his 2014 injury, such that the 2014 injury was not the direct and natural result of the 1997 injury. Cessna also argues the judge should have considered the merits of both docketed claims separately, instead of considering the claims together.

Spirit argues it is not liable because the undisputed medical evidence shows claimant's asserted 2014 injury by accident was not the prevailing factor in his need for medical treatment. Also, Spirit notes claimant sustained no anatomical or structural change, *i.e.*, an injury, in the 2014 incident.

Claimant largely argues he needs medical treatment due to his 1997 accidental injury, but if the Board concludes otherwise, argues he needs treatment due to his 2014 injury by accident. Should the Board find claimant has no remedy under the Kansas Workers Compensation Act, he argues K.S.A. 2014 Supp. 44-508(f)(2) is unconstitutional.

The issues are:

1. Is claimant's knee condition and need for medical treatment due to his 1997 accidental injury, his alleged 2014 injury by accident or both?

2. Should the judge have considered the 1997 and 2014 claims separately?

3. Can the Board find K.S.A. 2014 Supp. 44-508(f)(2) to be unconstitutional?

FINDINGS OF FACT

While working for Cessna on October 10, 1997, claimant hyperextended his knee after he fell about four feet when descending a ladder. A November 10, 1997 MRI revealed an ACL tear, a medial meniscal tear and a bone contusion. Robert Eyster, M.D., performed an arthroscopy, ACL reconstruction and patellar tendon autograft. Claimant reached maximum medical improvement on November 23, 1998, and was given a 22% right leg impairment rating and permanent restrictions against excessive squatting or climbing stairs. He settled his claim on December 3, 1998, with all future rights left open, including medical treatment. Claimant left work for Cessna in 1999 and went to work for Boeing/Spirit.

While working for Spirit on November 12, 2014, claimant jammed his right knee when sliding out of a plane. A November 18, 2014 MRI showed marked tricompartmental degenerative findings, loose bodies, osteophytes and evidence of the prior ACL repair with possible torn graft, in addition to medial and lateral meniscus tears. Claimant had two injections and physical therapy.

On April 9, 2015, the judge consolidated the cases "for purposes of determining causation and treatment recommendations for the claimant's right knee. Attorneys are to schedule a status conference when the case is ready for potential judicial action, either a preliminary hearing or an IME."[1] In an April 29, 2015 Agreed Order, the judge appointed Daniel J. Stechschulte, M.D., to perform an independent medical evaluation, which occurred on July 10, 2015.

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[1] The parties seem to agree the cases are consolidated, but a more explicit order of consolidation may be required if the parties and the judge intend the cases consolidated for *all purposes*. See *Davenport v. Marcon of Kansas, Inc.*, No. 111,888, 2015 WL 1125155 (Kansas Court of Appeals unpublished opinion dated March 6, 2015), *rev. denied* Jan. 25, 2016. *Davenport* states, "Absent a general order of consolidation by the ALJ, as was the case in *Solis*, the claims remain separate and distinct for appellate purposes."). In *Davenport*, an order of consolidation for pretrial purposes did not consolidate the cases for all purposes.

Dr. Stechschulte's report noted claimant was doing well and doing his normal job without any problems at all until November 12, 2014, when he jammed or hyperflexed his right leg sliding out of a plane. Claimant told Dr. Stechschulte that he had constant and increasing pain, particularly with prolonged activities, mechanical symptoms, his knee locked up at least weekly, and waking up with knee pain. The doctor performed a physical examination and took x-rays that showed severe loss of right knee joint space. He also reviewed 1997 and 2014 right knee MRI reports.

The doctor indicated claimant had severe and preexisting right knee posttraumatic arthritis, presumably due to the 1997 accidental injury, in addition to some mild exacerbation due to the 2014 accident. The doctor noted claimant's 1997 injury was the prevailing factor in his current right knee complaints and stated the 2014 accident was "insufficient to be a significant or substantial contributor to his right knee problems" and was, at most, a "triggering event."[2] Right total knee arthroplasty (TKA) was suggested.

Dr. Stechschulte testified claimant's need for surgery was the natural and probable consequence of his 1997 injury[3] and the 1997 injury was more contributory to claimant's need for surgery than the 2014 event. Dr. Stechschulte testified that the prevailing factor in claimant's need for a knee replacement was his 1997 knee injury and the progression of such injury over time resulting in degenerative changes. The doctor noted claimant's left knee only had minimal findings on an x-ray film. Dr. Stechschulte testified, "[T]he severity of the initial injury . . . and the progression over time led to the situation that [claimant] has in the right knee."[4]

According to Dr. Stechschulte, claimant's severe degenerative condition preexisted the 2014 event and the 2014 event did not cause his degenerative condition. The doctor testified claimant did not have any acute findings or an identifiable anatomical change to his knee from his 2014 accident, claimant's need for a knee replacement existed anatomically before the 2014 accident and the degenerative changes were all related to the 1997 injury. The doctor stated the 2014 event was probably a "triggering event" that could lead to an increase in symptoms or "recognition of symptoms."[5] According to the doctor, such increase in symptoms "possibly" led to him recommending a TKA, but the reason claimant "probably" needed surgery was his "horrible degenerative arthritis"[6] that was due to the 1997 injury.

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[2] Stechschulte Depo., Ex. 2 at 4.

[3] Stechschulte Depo. at 29.

[4] *Id.* at 22; see also pp. 27-28, 31-32, 36.

[5] *Id.* at 13.

[6] *Id.* at 13-14. The doctor also characterized claimant's degenerative condition as "so impressive and so overwhelming and so longstanding . . . ." *Id.* at 19.

Dr. Stechschulte testified it was not until the 2014 event and claimant becoming symptomatic that the need for surgery arose. Dr. Stechschulte was told by claimant he was asymptomatic and not hurting before the 2014 event, but Dr. Stechschulte did not believe him.[7] The doctor said claimant likely needed a knee replacement before the 2014 event because claimant had bone-on-bone change throughout his entire right knee, but he would not recommend surgery until claimant had symptoms warranting surgery. Dr. Stechschulte did not agree claimant needed surgery because of the 2014 event "[b]ecause it was inevitable."[8] Dr. Stechschulte testified the 2014 event probably aggravated claimant's underlying degenerative condition, but the event was not significant enough to accelerate his need for surgery or that it only possibly accelerated the need for surgery. The doctor could not identify anything the 2014 event would have done to claimant because his degeneration was so overwhelming that it was "hard to say what more could have been done to his knee."[9]

In the April 22, 2016 Order, the judge stated, in part:

> . . . With respect to which incident was the cause of claimant's current need for surgery Dr. Stechschulte testified that the former injury was more contributory. (Stechschulte p. 15) Under what is now called the old law, any contribution, be it an aggravation or an acceleration is compensable.
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> The court finds that claimant's condition is a direct and natural consequence of his October 10, 1997 claim. Respondent is ordered to provide a list of three physicians from which claimant is to choose an authorized physician. All costs and expenses of this action are assessed against case number 240070.

Cessna appealed.

PRINCIPLES OF LAW

Under K.S.A. 1997 Supp. 44-501(a) and K.S.A. 1997 Supp. 44-508(g), K.S.A. 2014 Supp. 44-501b(c) and K.S.A. 2014 Supp. 44-508(h), claimant carries the burden of proving the right to an award of compensation based on the whole record using a "preponderance of the credible evidence" and a "more probably true than not true" standard. K.S.A. 1997 Supp. 44-510(a) states an employer is responsible to provide an injured worker with medical treatment necessary to cure and relieve the effects of the accidental injury.

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[7] *Id.* at 15, 19. Dr. Stechschulte also referenced a medical record indicating claimant had prior knee pain at rest with bending or squatting that increased after the 2014 event. *Id.* at 29-30.

[8] *Id.* at 18.

[9] *Id.* at 24.

K.S.A. 1997 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 2014 Supp. 44-508 states, in part:

> (d) . . . The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. . . .
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> . . .
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> . . .
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> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Jackson states, "When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury."[10]

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[10] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

Stockman states, "The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident."[11]

Logsdon reiterates the *Jackson* "direct and natural result" rule and states:

- Whether an injury is a natural and probable result of previous injuries is generally a fact question.[12]

- When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.[13]

- While the direct and natural result rule may be inconsistently applied, "The more straightforward situations are those where a primary injury *itself* causes subsequent further injury to the same or other body parts; in these cases there is usually no "intervening" trauma or accident and the subsequent claim is allowed." (Emphasis in original).[14]

Nance states, "[W]here the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury."[15] In *Nance*, "The worsening of a claimant's compensable injury, absent any intervening or secondary injury, is a natural consequence that flows from the injury. It is a direct and natural result of a primary injury. Since Nance's worsening back condition is merely a continuation of his original injury, causation is not an issue."[16]

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[17]

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[11] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[12] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 1, 128 P.3d 430 (2006).

[13] *Id.*, Syl. ¶ 3.

[14] *Id.* at 83.

[15] *Nance v. Harvey County*, 263 Kan. 542, 550, 952 P.2d 411 (1997).

[16] *Nance v. Harvey County*, 23 Kan. App. 2d 899, 909, 937 P.2d 1245, *aff'd*, 263 Kan. 542, 952 P.2d 411 (1997).

[17] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

ANALYSIS

1. Claimant's need for medical treatment is due to his 1997 accidental injury while working for Cessna, not his 2014 event at Spirit.

Claimant's current need for medical treatment is due to his 1997 accidental injury. Spirit is not liable for claimant's medical treatment. As Spirit notes on page four of its brief, "This is the 'poster child' case the legislature sought to make non-compensable as compared to prior law." Under the new law, claimant does not have a compensable injury by accident because: (1) the 2014 event did not cause an injury – a lesion or change in the physical structure of his body; (2) the 2014 accident was not the prevailing factor in causing any injury; (3) under K.S.A. 2014 Supp. 44-508(f)(2)(B)(ii), the asserted 2014 injury by accident did not arise out of employment because the prevailing factor for claimant's need for medical treatment is the 1997 injury; and (4) even if there was a legal injury, K.S.A. 2014 Supp. 44-508(f)(2) states an injury is not compensable because work was a triggering factor.

Moving on to Cessna's arguments, it contends claimant sustained an intervening accidental injury in 2014 that increased his disability and terminates their obligation to provide compensation for the 1997 accidental injury. Cessna argues the judge wrongly applied the *Jackson* standard instead of the *Stockman* standard. According to Cessna, the judge found claimant's 2014 injury was the direct and natural result of his 1997 injury.

While the Board cannot glean the precise basis for the judge's ruling, he did not indicate claimant sustained a 2014 injury that was the direct and natural consequence of his 1997 injury. Rather, the judge held claimant's current condition was a direct and natural consequence of his 1997 injury, which is supported by Dr. Stechschulte's testimony.

From a temporal standpoint, it can be argued claimant did not need a total knee replacement until his 2014 incident. However, there is insufficient evidence to show claimant's need for medical treatment is due to the 2014 incident. Indeed, Dr. Stechschulte opined claimant's need for medical treatment was due to three things: (1) the 1997 accidental injury; (2) claimant developing posttraumatic arthritis due to the 1997 injury; and (3) the passage of time. The doctor also testified claimant did not have any identifiable new injury, in terms of physical findings, in 2014 and claimant's 2014 incident was insufficient to cause his medical condition and need for surgery. Claimant's need for a TKA is not due to his 2014 event.

The Board concludes claimant's current need for knee surgery is due to the 1997 accidental injury, not the 2014 event. As based on the medical evidence from the court-ordered physician, Dr. Stechschulte, claimant did not have a second injury that caused his need for a TKA.

2. The judge properly considered the 1997 and 2014 docketed cases together.

Cessna quotes *Poff*, a Board decision, as stating that when claims are consolidated, "each claim must be determined on its own merits separate from the other filed claims."[18] Cessna argues the judge should have independently ruled on each case based on the laws applicable for claimant's injuries in 1997 and 2014.

The judge did not err in hearing the consolidated cases together. *Poff* involved four separate claims that were never consolidated, unlike the consolidated cases in this matter. In *Poff,* each claim was considered separately without objection or a request to consolidate the claims. Mr. Poff wanted his claims to be heard in the aggregate, in the hope he would be found permanently and totally disabled. The Board ruled the non-consolidated claims had to be decided separately. The Kansas Court of Appeals affirmed, finding the judge did not abuse his discretion in issuing four separate and non-consolidated awards.[19]

3. The Board may not decide if K.S.A. 2014 Supp. 44-508(f)(2) is constitutional.

Not only is this issue moot, the Board does not have the authority to hold an Act of the Kansas Legislature unconstitutional.

CONCLUSIONS

WHEREFORE, the Board affirms the April 22, 2016 Order.

IT IS SO ORDERED.

Dated this _____ day of June, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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[18] *Poff v. IBP, Inc.*, No. 270,756, 2004 WL 515883 (Kan. WCAB Feb. 26, 2004).

[19] See *Poff v. IBP, Inc.*, 33 Kan. App. 2d 700, 703-04, 106 P.3d 1152 (2005).

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